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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 29, 2023 Session

THOMAS STEPHEN GOUGHENOUR, JR. v. MARION MICHELLE GOUGHENOUR

Appeal from the Chancery Court for Rutherford County
No. 20CV-2120 Bonita Jo Atwood, Judge

No. M2022-00297-COA-R3-CV

This is an appeal from a final decree of divorce involving the trial court's award of parenting time and requiring parental restrictions. The trial court entered a permanent parenting plan in which Mother and Father were awarded equal parenting time, with Father being named the primary residential parent. The trial court also ordered that neither Father nor Mother were to consume alcohol in the presence of Child. Father appeals. Having carefully reviewed the record, we affirm the trial court's order. We further award Mother her attorney's fees on appeal and remand to the trial court for a determination of the amount awarded.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and KENNY ARMSTRONG, J., joined.

Laurie Y. Young and L. Jeffery Payne, Murfreesboro, Tennessee, for the appellant, Thomas Stephen Goughenour, Jr.

Benjamin Lewis, Murfreesboro, Tennessee, for the appellee, Marion Michelle Goughenour.

OPINION

BACKGROUND AND PROCEDURAL HISTORY

Thomas Stephen Goughenour, Jr. ("Father"), and Marion Goughenour ("Mother") were married on February 10, 2011, and share one minor child ("Child"). On December 15, 2020, Father filed a "Petition for Divorce" and a separate petition for an order of

protection against Mother. The trial court subsequently issued a temporary restraining order against Mother, ordering that she have no contact with Father or Child. Later, the trial court granted an indefinite extension of the restraining order as to her contact with Father, but allowed her to have limited, supervised visitation with Child.

Subsequently, the trial court entered an order finding that Mother had a serious alcohol problem and ordered her to undergo a forensic alcohol assessment by Dr. Stephen Montgomery. Mother had previously undergone a non-forensic alcohol and drug assessment performed by Dr. Gerald Kaforey. Following his forensic alcohol assessment, Dr. Montgomery diagnosed Mother with alcohol use disorder and recommended that she attend a formal rehabilitation program.

The divorce trial occurred on December 7 and 15, 2021, and January 12, 2022. On February 11, 2022, the trial court entered a "Final Judgment of Divorce." Of particular pertinence to this appeal, the trial court made findings of fact which we restate and condense as follows:

1. Mother and Father consumed alcohol in Child's presence and that Father had "continued to purchase alcohol for Mother while, at the same time, advocating Mother was abusing alcohol and had mental issues."
2. Mother had voluntarily enrolled in the "BACtrack View alcohol monitoring system from February 2, 2021 to July 12, 2021 with all test results being negative." Further, Mother had been ordered by the trial court to enroll in the "Soberlink alcohol monitoring system," which she was enrolled in from July 12, 2021 to the time of the trial court's final order. As of the date of the final hearing in the matter, Mother had taken 533 tests with all of the results being negative.
3. Mother had obeyed all of the orders issued by the trial court and had "diligently performed directives of [the trial court], including the utilization of Soberlink."
4. "Father engaged in the action of habitually recording Mother's actions with his cell phone, despite Mother's repeated requests to cease the recording" and that Father admitted to altering the video and audio recordings of Mother during his cross-examination.
5. "Father listened to and recorded conversations between [Child] and Mother in violation of [the trial court's] [o]rder," even after the trial court had found Father to be in contempt of its orders for the same conduct while the divorce was pending.
6. Mother and Father had an "extremely toxic relationship."
7. Dr. Kaforey "performed an A&D Evaluation of Mother on March 31, 2021 and found the SAQ and DAST substance use questionnaires did not indicate problems with alcohol or drug abuse" and that he "made no diagnosis and indicated that no A&D recommendations were necessary."

8. Dr. Montgomery "performed a Rule 35 Evaluation of Mother on April 27, 2021," but the trial court noted that it was "not bound by the recommendations of Dr. Montgomery" and that it accepted certain portions and rejected certain portions of Dr. Montgomery's assessment. Specifically, the trial court noted that it had "numerous concerns" with Dr. Montgomery's assessment, as "he relied on transcripts from a hearing before the Special Master on February 1, 2021 and Motions filed by Father" and not orders of the trial court. Moreover, the trial court noted testimony which rebutted testimony given in the February 1st hearing.
9. Father "made derogatory and disparaging remarks about Mother to [Child]."
10. Mother and Father's testimony was "problematic" concerning the video recordings of Mother as well as Mother and Father's alcohol use.

Regarding Child, the trial court fashioned a parenting plan in accordance with the factors set forth in Tennessee Code Annotated section 36-6-106 and conducted a best interest analysis to determine whether Mother or Father should be designated as the primary residential parent and what would be the appropriate amount of parenting time for Mother and Father. Upon consideration of the requisite best interest factors, the trial court designated Father as the primary residential parent and, in order "to maximize the amount of parenting time" with Child, awarded 182.5 days with Child to both Mother and Father. Furthermore, the trial court ordered that Mother and Father "shall not consume any alcohol" during their parenting time with Child. This appeal followed.

ISSUES PRESENTED

Father raises a number of issues on appeal for our review, which we restate as follows:

1. Whether the trial court erred in considering Mother's alcohol and drug assessment that was not entered into evidence and discrediting the forensic alcohol assessment that was entered into evidence.
2. Whether the trial court erred by not considering the limiting factors enumerated in Tennessee Code Annotated section 36-6-406.
3. Whether the trial court erred in imposing a prohibition on Father's alcohol consumption during his parenting time.
4. Whether the trial court erred in awarding the parties equal parenting time.
5. Whether Father is entitled to attorney's fees on appeal.

For her part, Mother raises only a single additional issue on appeal, restated as follows:

1. Whether Mother is entitled to attorney's fees on appeal.

DISCUSSION

Mother's Alcohol & Drug Assessment

Father's first issue concerns an evidentiary issue arising from Mother's alcohol and drug assessment. Specifically, Father argues that the trial court erred when it considered Mother's alcohol and drug assessment conducted by Dr. Kaforey, which was not entered into evidence,[1] and instead discredited the forensic alcohol assessment performed by Dr. Montgomery, who testified at trial and whose report *was* submitted into evidence.

"It is well settled that a trial court's decision must be grounded on the evidence introduced." *In re Alexis S.*, No. E2018-01989-COA-R3-PT, 2019 WL 5586820, at *5 (Tenn. Ct. App. Oct. 29, 2019) (citing *Allen v. Albea*, 476 S.W.3d 366, 374 (Tenn. Ct. App. 2015)). Accordingly, "a trial court's decision that is 'based on something other than the evidence introduced at trial' should not be allowed to stand." *Id.* (citing *Allen*, 476 S.W.3d at 374). In determining whether consideration of evidence not introduced at trial constitutes an error requiring reversal, we are guided by the provision set forth in Rule 36 of the Tennessee Rules of Appellate Procedure, which provides, in pertinent part:

> A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right **more probably than not affected the judgment or would result in prejudice to the judicial process**.

Tenn. R. App. P. 36(b) (emphasis added). Thus, in order for this Court to set aside the trial court's ruling, its consideration of the evidence not introduced at trial must be such that it "more probably than not affected the judgment" or resulted in prejudice to the judicial process. We do not find that the consideration of Dr. Kaforey's report meets this standard. In its final order, the trial court stated that:

> The Court finds Dr. Gerald Kaforey performed an A&D Evaluation of Mother on March 31, 2021 and found the SAQ and DAST substance use questionnaires did not indicate problems with alcohol or drug use. He further noted Mother was not defensive as measured by the truthfulness scale on the SAQ. Dr. Kaforey made no diagnosis and indicated that no A&D recommendations were necessary.

This finding appears to be the sole mention of Dr. Kaforey or his report in the final order. The trial court made numerous other findings concerning Dr. Montgomery's report and testimony of various individuals concerning Mother's alleged alcohol abuse. We find no

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[1] Dr. Kaforey's report was attached as an exhibit to Mother's motion for status hearing, which was filed with the trial court on April 9, 2021.

indication that the trial court's consideration of Dr. Kaforey's report "more probably than not affected [its] judgment," nor does Father present any argument in support thereof. As such, we cannot agree that the trial court's consideration of Dr. Kaforey's report constitutes such an error as to warrant the trial court's order being set aside.

Father also maintains that the trial court erred when it discredited Dr. Montgomery's assessment of Mother. "The testimony or recommendation of an expert is generally advisory and not binding upon the trial court as trier of fact." *Morgan v. Morgan*, No. E2020-00618-COA-R3-CV, 2021 WL 5792393, at *6 (Tenn. Ct. App. Dec. 7, 2021) (citing *Brunetz v. Brunetz*, 573 S.W.3d 173, 182 (Tenn. Ct. App. 2018)). Thus, it was within the trial court's discretion as to the credence it would afford to Dr. Montgomery's report. We find no evidence that the trial court abused its discretion. Therefore, we find no error in the trial court discrediting Dr. Montgomery's report.

Tennessee Code Annotated § 36-6-406

Father's next issue concerns whether the trial court erred in not considering the "limiting factors" discussed in Tennessee Code Annotated section 36-6-406, a statute which provides that a trial court can place certain limitations or include preclusions in any provision of a parenting plan concerning a parent's involvement or visitation with a child if any of the following are found:

> (1) A parent's neglect or substantial nonperformance of parenting responsibilities;
> (2) An emotional or physical impairment that interferes with the parent's performance of parenting responsibilities as defined in § 36-6-402;
> (3) An impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting responsibilities;
> (4) The absence or substantial impairment of emotional ties between the parent and the child;
> (5) The abusive use of conflict by the parent that creates the danger of damage to the child's psychological development;
> (6) A parent has withheld from the other parent access to the child for a protracted period without good cause;
> (7) A parent's criminal convictions as they relate to such parent's ability to parent or to the welfare of the child; or
> (8) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

Tenn. Code Ann. § 36-6-406(d).

Notably, Father did not raise section 36-6-406(d) in the trial court, and we find no support, nor does Father cite to any, concerning the notion that the limiting factors

contained in section 36-6-406(d) require the trial court to consider the same *sua sponte*. In any event, as noted by Mother in her brief, Father's brief on appeal "fails to connect the dots" between how certain facts he asserts as to Mother necessarily fit into the limiting factors contained in section 36-6-406(d). In light of this, and because Father did not raise this issue in the trial court, we conclude the issue to be waived.[2]

Trial Court's Restriction on Father's Alcohol Consumption

Father's next issue concerns his contention that the trial court erred in imposing a prohibition on his consumption of alcohol while in Child's presence. Specifically, Father argues that there was no proof entered into evidence indicating that his alcohol consumption was "problematic," and he further contends that Mother's counsel did not make an argument concerning his alcohol consumption.

With respect to this Court's appellate review of parenting plans, the Supreme Court has stated:

> This Court has previously emphasized the limited scope of review to be employed by an appellate court in reviewing a trial court's factual determinations in matters involving child custody and parenting plan developments. *Armbrister* [*v. Armbrister*], 414 S.W.3d [685] at 692–93 [(Tenn. 2013)] (stating that the appropriate standard of "review of the trial court's factual findings is de novo upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise").
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> [T]rial courts enjoy broad discretion in formulating parenting plans. *Id.* at 693 (citing *Massey-Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007)). "Thus, determining the details of parenting plans is 'peculiarly within the broad discretion of the trial judge.'" *Id.* (quoting *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988)).

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[2] Father's brief also touches on section 36-6-406(a), and in a lone sentence, states that "[t]he behaviors that Mother exhibited which implicate the limiting factors include: (1) abuse (Tenn. Code Ann. § 36-6-406(a)(2))[.]" Father does not engage with (a)(2) anywhere else in his argument concerning this issue, nor does he effectively engage with the language contained in (a)(2) by asserting this conclusory allegation. Moreover, Father's claim contains no citation as to what specific acts of Mother allegedly come under the purview of (a)(2), and we decline to construct his argument for him as "[i]t is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her[.]" *Sneed v. Bd. of Prof'l Resp.*, 301 S.W.3d 603, 615 (Tenn. 2010). As such, we conclude that any assertions Father raised as to section 36-6-406(a)(2) are also waived for briefing deficiencies.

C.W.H. v. L.A.S., 538 S.W.3d 488, 495 (Tenn. 2017). Although Father contends that our case law reveals "no case on point pertaining to the prudence of an unfounded prohibition" regarding the consumption of alcohol in a parenting plan, this Court has recently addressed a somewhat similar issue in *Williams v. Williams*, No. E2021-00432-COA-R3-CV, 2022 WL 1043632, at *8–14 (Tenn. Ct. App. Apr. 7, 2022). In *Williams*, this Court found that the wife had presented "substantial evidence" of Husband's alcohol abuse, which was reflected in the trial court's findings of fact. *Id.* at *13. Moreover, the trial court in *Williams* credited testimony that evinced Husband's alcohol abuse. *Id.* In light of the various testimony received by the trial court in *Williams*, this Court determined that the evidence taken together "demonstrate[d] that the [trial] court should have restricted Husband from consuming alcohol during his co-parenting time in order to ensure the safety of the Child." *Id.*; *see also Rogers v. Rogers*, No. E2002-02300-COA-R3-CV, 2003 WL 21673678, at *4 (Tenn. Ct. App. July 14, 2003) (modifying the trial court's parenting plan to eliminate the order's provision which allowed the husband to consume alcohol during his co-parenting time after the first six months of visitation due to the "substantial evidence of the husband's problems with alcohol").

In the present matter, a review of the record reflects certain incidents where Father was intoxicated in Child's presence and was yelling at another individual while both Child and the individual's children were under his care. This individual testified that, subsequent to this interaction, she and her husband no longer left their children at Father and Mother's home if only Father was present. In its final order, the trial court found that "Father and Mother have consumed alcohol in the presence of the child and Father continued to purchase alcohol for Mother while, at the same time, advocating Mother was abusing alcohol and had mental issues." As noted earlier in this Opinion, trial courts are afforded wide discretion in creating parenting plans, and this Court is reluctant to second-guess their decisions concerning the same unless "the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). "We will also give great weight to the trial court's assessment of the evidence because the trial court is in a much better position to evaluate the credibility of witnesses." *Boyd v. Heimermann*, 238 S.W.3d 249, 255 (Tenn. Ct. App. 2007) (citing *Burton v. Warren Farmers Coop.*, 129 S.W.3d 513, 521 (Tenn. Ct. App. 2002)). In light of these standards, and based on our review of the record, including the previously-referenced evidence, we find no indication that the trial court abused its discretion when it ordered Father not to consume alcohol in Child's presence.

Trial Court's Award of Equal Residential Time to Mother and Father

Father also maintains that the trial court erred when it awarded Mother and Father

equal residential time with Child because, according to Father, "all [of the] best interest factors either favored Father or were equal or inapplicable."

"Trial courts have broad discretion to fashion parenting plans that best serve the interests of the children." *Shofner v. Shofner*, 181 S.W.3d 703, 716 (Tenn. Ct. App. 2004). "They must, however, base their decisions on the evidence presented to them and upon the proper application of the relevant principles of law." *Id.* Furthermore, "[i]t is not the function of appellate courts to tweak a [residential parenting schedule] in the hopes of achieving a more reasonable result than the trial court." *Eldridge*, 42 S.W.3d at 88. "A trial court's decision regarding the details of a residential parenting schedule should not be reversed absent an abuse of discretion." *Armbrister*, 414 S.W.3d at 693 (quoting *Eldridge*, 42 S.W.3d at 88). "An abuse of discretion occurs when the trial court . . . appl[ies] an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." *Id.* (quoting *Gonsewski*, 350 S.W.3d at 105). "A trial court abuses its discretion in establishing a residential parenting schedule 'only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.'" *Id.* (quoting *Eldridge*, 42 S.W.3d at 88). When determining the best interests of a child in terms of establishing a parenting plan, trial courts must look to the factors contained in Tennessee Code Annotated section 36-6-106.[3]

In the present matter, the trial court went through *each* of the best interest factors enumerated in section 36-6-106(a) and made written findings, which we restate and condense in part as follows:

1. Mother and Father each have a strong relationship with Child. Mother performed the majority of parenting responsibilities from Child's birth until Father obtained an order of protection against Mother, after which Father performed the majority of parenting duties. The trial court determined this weighed in Father's favor.
2. Father has made derogatory and disparaging remarks regarding Mother in Child's presence and his conduct is not conducive in facilitating and encouraging a close and continuing parent-child relationship between Child and both Mother and Father. The trial court also found that Mother is unable to co-parent with Father and that, based on both parents' testimony, their co-parenting is "problematic" and there are concerns as to either Mother or Father's likelihood of honoring or facilitating any court orders concerning parenting arrangements and rights.
3. Mother and Father have provided Child with food, clothing, medical care, education, and other necessary care.

[3] This case was initiated by the filing of a petition for divorce on December 15, 2020. Accordingly, the relevant best interest factors are those in place at the time of the filing.

4. The order of protection entered against Mother resulted in her not having meaningful parenting time with Child for almost 12 months, whereas, during this time, Father has performed parenting duties for Child.
5. Mother and Father love Child and are emotionally attached to Child.
6. Child is well-adjusted and has an attachment to both Mother and Father.
7. The trial court found that Mother's words, conduct, and use of alcohol directly affected her emotional fitness as it related to her ability to parent Child. The trial court noted several actions of Father, including, among other things, recording a conversation between Mother and Child in violation of the trial court's orders and making disparaging remarks about Mother, which led the trial court to have some concerns regarding Father's emotional fitness as it related to his ability to parent Child.
8. Mother and Father both provided a stable environment for Child prior to the order of protection. Since the entry of the order of protection, however, Mother was not permitted to enter the marital residence and had to have supervised visits with Child. Father, on the other hand, provided a stable environment and continuity for Child.

In light of its findings concerning the best interest factors, the trial court determined that it was in Child's best interest that Father be designated as the primary residential parent, but that each parent will have 182.5 days of parenting time with Child.

In his brief, Father predicates his argument that the trial court erred in awarding equal parenting time to the parties in part based on the fact that it determined that three of the factors favored Father while the remaining were either inapplicable or favored Mother and Father equally. We do not find this alone warrants a finding of an abuse of discretion on the part of the trial court. "[T]he General Assembly has established the aspirational goal for the courts to maximize each parent's participation in the life of the child." *Gooding v. Gooding*, 477 S.W.3d 774, 784 (Tenn. Ct. App. 2015); *see also* Tenn. Code Ann. § 36-6-106(a). Here, despite Father's contentions, the record makes clear that Mother has followed the directives of the trial court concerning her alcohol abuse, including 533 negative alcohol monitoring test results, and that Child has a strong bond with her in addition to Father. The fact that the trial court found three of the factors weighed in Father's favor does not in and of itself warrant a finding that it is in Child's best interest for Father to have more parenting time than Mother. Moreover, the trial court's findings as to the best interest factors also indicate numerous concerns that the trial court had with *Father's* behavior and which Father's brief on appeal appears to ignore. "[C]hild custody litigation is not a sporting event that can be determined by simply tallying up wins and losses." *Paschedag v. Paschedag*, No. M2016-00864-COA-R3-CV, 2017 WL 2365014, at *4 (Tenn. Ct. App. May 31, 2017). Father's argument contradicts long-settled case law stating that "the determination of what is in a child's best interest does not call for a rote examination of each and every factor and then a determination of whether the sum of the factors tips in favor of or against the parent." *Id.* In fact, "[a] best interest analysis could

turn on a single factor." *Id.* (citing *In re Marr*, 194 S.W.3d 490, 490 (Tenn. Ct. App. 2005)).

In light of the foregoing, we find Father's argument that the trial court erred in awarding Mother and Father equal parenting time to be unavailing, as it does not appropriately take into consideration the deferential standard of review by which we review a trial court's parenting arrangement. Accordingly, we conclude that the trial court's determination as to the parenting time was not an abuse of discretion.

Attorney's Fees on Appeal

Mother and Father each request attorney's fees on appeal. "Whether to award attorney's fees on appeal is a matter within the sole discretion of this Court." *Luplow v. Luplow*, 450 S.W.3d 105, 119 (Tenn. Ct. App. 2014). In determining whether to award a party attorney's fees on appeal, "we consider the ability of the requesting party to pay the accrued fees, the requesting party's success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that should be considered." *Ellis v. Ellis*, 621 S.W.3d 700, 709 (Tenn. Ct. App. 2019). Exercising our discretion, and in light of our decision herein, we find Mother is entitled to her attorney's fees on appeal.

CONCLUSION

Based on the foregoing, we affirm the trial court's order and remand for a determination of the amount of Mother's attorney's fees on appeal.

s/ Arnold B. Goldin
ARNOLD B. GOLDIN, JUDGE